Supreme Court, U.S.
FILED
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NO. 91-548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

In re: WILLIAM W. CHOATE and all parties similarly situtated;
Petitioner,

VERSUS

THE FEDERAL LAND BANK OF WICHITA,
n/k/a The Farm Credit Bank Of Wichita,
Appellee.

PETITION FOR WRIT OF CERTIORARI

(APPEAL FROM SUPREME COURT OF THE STATE OF OKLAHOMA CASES 86,777; 70,205; and 73,343)

ON APPEAL FROM
THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA
DISMISSED IN PART AND AFFIRMED IN PART

WILLIAM W. CHOATE pro se,
P. O. Box 65
SEMINOLE, OKLAHOMA 74818
(405) 382-5345

QUESTION PRESENTED FOR REVIEW

I S S U E S

(1) DID THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA DIVISION III IN ITS MEMORANDUM OPINION DATED NOVEMBER 13, 1990 ERROR IN DECISION THAT DENIED PETITIONER WILLIAM W. CHOATE ALL OR PART OF THE FOLLOWING:

(a)(i) THE SAID COURT OF APPEALS HAS DECIDED QUESTIONS OF SUBSTANCE: THAT IS, DIRECT AFFECT UPON MILITARY MEMBER RIGHTS AND SPECIFICALLY CODIFIED FEDERAL REMEDIES: THE QUESTIONS INVOLVE THOUSANDS OF CITIZENS OF THIS STATE WHICH ISSUES HAVE NEVER BEEN DETERMINED HERTOFORE BY THIS COURT: ITS DECISION VESTS IN A FEDERALLY REGULATED LENDER THE RIGHT TO ACCELERATE AND FORECLOSE UPON A REAL ESTATE PROMISSORY NOTE THAT IS NOT IN DEFAULT BY ITS TERMS IN DIRECT CONTRAVENTION OF FEDERAL LAW?

(ii) THE SAID COURT HAS DECIDED SEVERAL QUESTIONS OF SUBSTANCE IN WASY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT?

(iii) THE SAID COURT HAS DEPARTED SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN THAT SAID COURT OF APPEALS DENIED APPELLANT A STAY OF PROCEEDINGS DUE TO HIS ACTIVE MILITARY DUTY; IT DISMISSED HIS CAUSE PREDICATED UPON A PURPORTED SETTLEMENT WITH HIS CO-DEFENDANT, WHO MERELY PAID TO APPELLEE THE AMOUNT OF DEFICIENCY AWARDED BY THE TRIAL COURT AFTER A FORECLOSURE SALE BUT ON CONDITION OF ASSIGNMENT OF HIS RIGHTS AND REMEDIES TO THE APPELLANT?

NO. _____

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THE FEDERAL LAND BANK OF WICHITA,
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Appellee.

PETITION FOR WRIT OF CERTIORARI

(Pursuant to Rule 10 et seq. & 28 U.S.C. 1257 a)

COMES now Appellant William W. Choate, pursuant to Rule 10 et seq. and 28 U.S.C. 1257 (a) and Petitions this Court for a writ directing that certiorari be granted to review the Memorandum Opinion of the Court of Appeals, Division III for the State of Oklahoma, filed on Nov. 13,

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RULE 14.1. (e) Jurisdiction shown herein above (supra)

1990 which denied Appellant stay of proceeding in accordance with 50 App. U.S.C. 521. Both the Petition for Rehearing and the Application for Extension of time to file petition for Rehearing on Appellant's Application for Stay was denied on January 28, 1991 and Cetiorari was denied on May 21, 1991 by the Supreme Court of the State of Oklahoma. An extension of time to file this Petition to and including September 18, 1991 was granted by Justice Byron R. White on the 16th of August, 1991 pursuant to Rule 13.6.

Rule 14.1. (b) JOHNNY E. JOHNSON; CAROL E. JOHNSON; FIRST NATIONAL BANK OF SEMINOLE; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEMINOLE; AND THE UNITED STATES OF AMERICA, ex rel. INTERNAL REVENUE SERVICE; STATE OF OKLAHOMA, ex rel.; ROBERT H. HENRY; EDNA B. CHOATE; JOHN I. M. CHOATE AND GRETCHEN L. CHOATE.

STATEMENT OF FACTS

In December 1985, after acknowledging "Loan balance not yet due" on Petitioner's Note of $66,616.82, Appellee called the note for a Balance of $87,886.41 even though unmatured principal payments required by Respondent and Appellant had reduced the loan balance due by amortization to the date November 1992. [even without credit for the default interest charged in error.] Petitioner's Promissory Note had provided for <u>voluntary</u> advance payments by the makers and required that enforcement by the payee be governed by federal law and state law.

In April 1986 the Oklahoma "Moratorium Act" prohibiting foreclosure by the Appellee for one year to permit refinancing or restructuring efforts. At the time Appellant was seeking such refinancing pursuant to 12 U.S.C. 2207(a),

38 U.S.C. 1802 (a) and (d), and under the Farm Credit System Capital Corporation created by the 1985 Farm Credit Act, which was specifically exempted from the "Moratorium Act". The raising of funds from a mortgage on his home, not secured to the Appellee, was denied to Petitioner at the behest of Respondent which denial was not disclosed at that time to Petitioner, on the concealed representation that "he had a 30 - year - loan in default with $88,000 due," when in fact that amount, even if correct, would not be due until October 1992.

Another attempted V.A. "automatically" guaranteed home loan effort was denied directly by the V.A. on November 5, 1986 based on information from credit from source other than credit report." The following week Respondent brought this action for a judgment of $91,867.51, which amount was not due by terms of the Note

sued upon until February 1991. At trial of the matter, the Court sustained objections and demurrer to affirmative defenses and effected what amounted to a directed verdict.

Subsequent to the "alleged" trial and this judgment, the 1987 Agricultural Credit Act imposed additional constraints on Respondent's right to continue enforcement by foreclosure, including (1) prohibition on acceleration where the note terms of amortization had been met [12 U.S.C. 2202 (b) and (c)], (2) forebearance when there exists "any way that will make it probable that the operations of the borrower will become financially viable", and (3) required restructure where the cost of restructure was less than that of foreclosure [12 U.S.C. 2202a(a)(7) and (e)(1), all of which remedies, though invoked, were denied to the Petitioner as well as any

opportunity to repurchase (Sec. 2219a), or to lease the property

Petitioner's research into the regulator's FCA Examination Manual and Congressional hearings revealed that the cause for Appellee's vehement course in impairing Petitioner's preformance lay in its having committed Petitioner's loan as collateral for its bonds which had no call provisions, and by permitting loss of such security by prepayment of its loans, a "postive gap" in collateral position occured which was unacceptable to bond investors. Appellant further documented the categorical denial of access to loan guaranty and other sources of refinancing by his interrogatories to Appellee in the involuntary Chapter 7 proceeding procured by Appellee against him in the United States Bankruptcy Court for the Western District of Oklahoma (88-07174).

The Veterans Administration Board of

Veterans Appeals denied Appellant's request for review of denial of his credit as being without jurisdiction to do so, but in so doing, the dessenting opinion revealed the disposition of the Administration and the Courts to refuse to address or remedy a practice which would "open the flood gates" to many similarly deprived.

On about Feb. 17, 1990 Co-Appellant John Choate filed in the District Court his pleading memorializing his payment of the default judgment, which the Court of Appeals ruled as justification for rendering issues moot.

Having returned to active military duty at locations outside this jurisdiction to support his family, the Petitioner had no ready access to the Court Clerk's files, adequate library facilities, or even his office files. Therefore, he invoked the

relief of 50 App. U.S.C. 521, which was summarily denied him on the premise that Petitioner was a "volunteer" and that he should have been able to get his Commander, a layman in court matters, to execute an affidavit attesting to the adverse affects upon his ability to conduct litigation.

ARGUMENTS

Proposition I: THE COURT OF APPEALS ERRED IN DECIDING QUESTIONS OF SUBSTANCE WITH NO CITATION OF AUTHORITY HERETOFORE DETERMINED BY THIS COURT.

At page 3,line 31 to 34 and page 4, lines 4 to 6 of the Memorandum Opinion (Appendix), the Court asserts the Record contains nothing to support the premise that the advance payments constituted prepayment of the Note

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RULE 14.1. (e), (i), (ii), and (iv) WITH (iii) n/a.

which precluded a concludion of default. The Court of Appeals cited as its only authority the Application for Loan Servicing provision that the partial release consideration "shall be applied on the indebtedness... in such manner as the Federal Land Bank of Wichita may elect." and the Shinn v. Francis, 404 (OK 1965) decision. The Promissory Note clearly provided that the discretion to voluntarily pay in part the principal in advance was granted to the maker, the Petitioner. 12 C.F.R. 614.4510 (d) (1) had made a non-discretionary duty upon Respondent to grant partial release of security when this occured. 12 U.S.C. 2017 had set 85% of appraised value as the loan limit and Respondent's appraisal of $144,000 (while the remaining balance would be $88,000) showed the partial release to be justified without requiring advanced payment on the Note. The Amortization

Schedule showed the rate at which the principal was to be retired according to provisions of the Note.

Loan History prepared by Respondent showed that the Respondent elected to apply the $20,000 as "unmatured principal" and thereafter "billed" or required principal amounts in advance of that provided in the Note sued upon. Therefore, Respondent only required the $20,000 as consideration, which should have been voluntary as to Petitioner according to the Note. Respondent ignored the partial release it was required to give according to federal law, and it also "maintained the improper practice" of requiring payments on principal not due according to terms of the Note. The Court of Appeal's opinion only addresses the first $20,000 and neglects to speak to or acknowledge the periodic advance principal billed and paid thereafter for

an additional five years.

The State Appeals Court asserts that the issue of prepayment was first raised after the judgment, no evidence of it being uncontroverted is alluded to. Petitioner's testimony (e.g. Vol. 1, page 150 of the Trial Record) demonstrates that from the very beginning in 1979, he relied on agricultural financing to allow advance payment to permit compliance with the Note Schedule.

The Shinn case is relied on for authority that the Court on appeal is not to weigh but to examine evidence to determine whether there is competent evidence to support the jury findings. In this case, by uncontroverted testimony of Respondents' Manager of Mortgage loan Accounting at page 97, Volume 1 of the Trial transcript, the $84,694.90 declared by Respondent as due after

payment made subsequent to the Notice of Call balance shown on page 8 of the Loan History and would not be due by amortization until January 1994. Therefore, although a jury might find an amount owing, that doesn't necessarily make it past due or in default, which is a question to be determined as a matter of law by the instrument provisions as executed. The Court cites no authority for a conclusion of law that a note can be determined to be in default even though the principal is paid sufficiently in advance so that even adding purported default interest leaves a total balance still less than that agreed on in the Note calculated to the Notice of Call or the filing of the Petition.

As cited in Petitoner's Brief in Chief, the case of Sentinal Acceptance Corp. v. Colgate, 424 P2d 380 stated: (Co. 1967).

"When the evidence consists of written documents,we are not bound by the trial court's findings relative thereto.

and in Beth-June, Inc. v. Wil-Avon Merchandise, 233 A2d 620, (Pa.1967), it was said:

"We hold that if a mortgage is to seek a premium or penalty upon prepayment, it must specifically provide therefore in the mortgage instrument. [cited in 532 P2d 758]

Not only does the instant Mortgage fail to provide a penalty for prepayment, the Note grants to Petitioner the option ["may"] of such prepayment. Therefore, the question is on of law as set forth in the provisions, not one of fact in the jurors' perception of the parties relationship. The Court in its Opinion asserts that petitioner admitted to being in default. "Default in paying as billed" is not the same as "default in payment as due under the terms of the Note sued on." At page 158 of the Trial transcript, Petitioner answered

the question and did clearly raise the advanced payments issue. At Page 159, Vol. 1 of the Trial transcript, for example, the Court refers to "the creditors is always right" standard.

Clearly, it is because of such abuses that the statute of frauds protects people from verbal "commitments' being procured to nullify written agreements. The Court of Appeals was not asked to weigh evidence for finding of fact justification, but rather to examine it for the applicable matters of law ignored herein which made the Trial Court's judgment and the Court of Appeals affirmance of the same inconsistent with the terms of the instrument sued upon.

50 App. U.S.C. 521 provides:

"At any stage thereof any action or proceeding in any court in which a

person in military service is invoked, either as plaintiff or defendant, during the peroid of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [section 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action of the defendant to conduct his defense is not materially affected by reason of his military service. (emphasis added)

In its Order denying Petitioner's Application for Stay, the Court of Appeals not only read into this provision that it pertained to "involuntary" service, but also in quoting the "relevant part", the Court omitted "on its own motion. The "shall" condition was met by Petitioner's application.

Proposition II: THE COURT OF APPEALS ERRED IN THE APPEAL IN A WAY NOT IN ACCORD WITH DCISIONS OF THIS

COURT OR OF THE SUPREME COURT OF THE UNITED STATES AS TO RIGHTS OF BORROWERS WHO ARE IN THE MILITARY SERVICE.

At page 5, the Court of Appeals Opinion states that the purpose of the Attorney General intervention was to defend the Moratorium Act, but when that law was found to be unconstitutional, that function ended. The only authority cited is Federal Land Bank Of Wichita v. Story, 756 P2d 588 (OK 1988).

It is true that both the filing of this case and the trial were during the statutory moratorium period, but as quoted in the Story case, the Moratorium Act specifically exempted the Captial Corporation from the foreclosure prohibition. It was exactly that loan guaranty refinancing pursuant to 12 U.S.C. 2012 (20) and 2207 that Petitioner was attempting to use under the 1985 Farm

Credit Act as applied to Veterans Administration loan guaranty on his own home which was not secured to the Respondent but which was sufficient to pay off the balance claimed by Respondent.

It is significant that the Story case refers to the purpose of the Moratorium Act as being prompted by economic conditions. In the U. S. House of Representatives Subcommittee on Agriculture and related agencies appropraitions on April 23, 1986, less than one month before the Moratorium Act was to become effective, at page 941 of the Congressional Record (page 2, Exhibit M), the Chief Economist for the regulator of this Respondent testified:

...the creation of the Farm Credit Capital Corporation by Congress late last year was designed exactly to help stabilize against that dumping [of rural properties on the economy].

On July 17, 1989 the Respondent filed its Answer to Requests for Admissions in the

Adversary proceeding it had brought against the petitioner in U.S. Bankruptcy Court for the Western District of Oklahoma, Case 88-07174-TS, Adv. 89-54 (Exhibit N) in which it admitted that Petitioner was invoking the Capital Corporation refinancing at the time the foreclosure action was being prosecuted and that

> ...not one single borrower in the entire [appellee's] District of four states was allowed that service by sale of his account to that entity.

However, the Attorney General either neglected or did not understand the role of the Capital Corporation in acquiesing to withdrawal on the basis of unconstitutional interference with contract. Therefore, this Court should not apply a standard to the instant case which did not apply by its factual circumstances, to wit: the moratorium should have been allowed to make sure the Capital Corporation relief was not

categorically denied.

On page 5, lines 17 to 21 of the Opinion, the Court of Appeals asserts the issue of the Veterans Administation was not preserved for appeal, citing Reeves v. Melton, 518 P.2d 57, 64 (OK Ap. 1974), which case ruled alleged errors were not properly preserved for appeal because that Appellant had not both requested and excepted to instructions.

In this case, the Application for New Trial followed the format of allowable causes as listed in the statute which pertained, the Veterans Administration being party to the imparment of his performance by denial of his automatically guaranteed home loan right for refinancing but no claim of money damage was being made against the V. A. only affirmative defenses as they apply to 38 U.S.C. 1820. Prior to trial, the

Court had disallowed making VA a party to the case, although the initial Answer had included this Cross-Claim.

At trial, the Record shows multiple objections by Appellee to the admission of testimony into evidence of V. A. officials, to which Appellant excepted and was allowed to do so by the trial court, making offers of proof.

Finally, the trial court sustained Appellee's demurrer to Appellant's entire case of defense and counter-claim, so that no instructions thereon were permitted to the jury.

Appellant urges that the issues of impairment of his performance and denial of his statutory rights as involve both the Appellee and the Veterans Administration as alluded to in 12 U.S.C. 2207 were repeatedly invoked both by

pleading and in open court. This appeal merely asks that the case be remanded with instructions to allow the consideration by the jury of the issues of his performance being impaired and his rights denied to orchestrate the foreclosure; in addition thereto, the 1987 consideration for restructuring raised factual issues in 12 U.S.C. 2202a(a)(7), (e)(1), and 2202d(b) and (c) which should be considered by the trier of fact.

It is a common maxim in the law that the nomenclature itself of the legal theory to be invoked is not itself a conclusion that must be pled, but rather, the factual basis upon which the legal theory can be applied must be disclosed. Appellants' pleadings making frequent reference to accounting, statutory, and regulatory controls, and undue impositions made by Appellee due to its

own precarious position regarding collateralization of its bonds give this premise. The Court of Appeals indicates that the Record is devoid of reference to evidence that Appellants' Note and Mortgage were instruments of security for Appellee's bonds. However, Appellant offered into evidence the records of proceedings reporting the regulators' explanations of the bond problem precipitating the economic problem and the denial of loan guaranty access to refinancing. Then after the trial it was disclosed that the regulator had an examination manual which stated that those bonds were secured by the loans made (page 1, Exhibit M), which quotation has previously been pled.

Therefore, adequate evidence exists for justifying referral of the matter to trier of fact upon the issue of trust treatment or other accountability. A

page 20 of the U.S. Senate hearing, ibid. (S.H.99-974) the FCA Chairman, Frank Naylor had said," ... it is the responsibility of the lender... to consider how they might help loans on a case-by-case basis." Obviously, it is the lender, not the borrower who is on distribution for explanatory material from regulators. However, the "case-by-case" approach resulted in not one single borrower being allowed access to the capital corporation relief, in Appellee's District.

Proposition III: THE COURT OF APPEALS ERRED IN DEPARTING SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

On page 2, line 16 to 21 of the Court's Memorandum Opinion, it is asserted that any issue related to the dismissed parties is now moot and that

Petitioner William W. Choate was not substituted for John Choate in any cause. This decision is predicated upon a multi-purpose pleading purported to be a settlement by which Respondent released the said John Choate and his wife.

As shown in Exhibit P, said co-appellant filed in the District Court a pleading by which he memorialized payment of the Deficiency Judgment and made that payment subject to assignment of his rights and claims to William Choate.

12 O.S. 2010(D) specifically allows for assignment of claims in contract disputes. Although the Court of Appeals characterizes the payment and dismissal as voluntary, the fact that an in personam deficiency judgment had been entered gave the appellant little choice. In paying the full amount of the judgment and removing himself from the case lest

further assessments were made, no compromise as to him was made on the part of the appellee. There is nothing in the Record that John Choate executed that sets forth release of his claims against the Respondent or in any other manner dismissing such claims, which were preserved by assignment to the remaining Petitioner William Choate. Therefore, the "settlement" was one of satisfying the deficiency judgment, not releasing claims.

On page 2, lines 25 to 29, the Court declined to review Petitioner's mental Brief as having been filed without leave of Court and as not containing any allegation of error. Both these issues are discussed in Petitioner's Response filed 24 September, 1990 to the Court's Order to show cause why the amended petitions should not be dismissed for failure to procure such leave of court.

It was pointed out that Rule 1.17 was invoked, but more significantly, Rule 1.18(c) was invoked because the instruction to consolidate in the same appeal multiple decisions applied here. In this case, the judgments on the Note and foreclosure had been entered in 1987, but on January 6, 1988 the 1987 Agricultural Credit Act prohibiting continuing foreclosure proceedings until consideration for restructuring had been completed went into effect.

12 O.S. 991(b) states:

> If a motion for a new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted.

Petitioner's Application for New Trial filed 23 April 1987, over eight months before the new Act with the additional rights went into effect. Compliance with

the restructuring requirements was specifically addressed in the amended Petitions in Error, to wit: the required calculations comparing foreclosure and restructuring costs which were not made, the repurchase right without having to pay in advance beyond what the Note required, and the forebearance in any manner to "make it probable that the operations of the borrower will become financially viable", all of which were categorically denied. (see 12 U.S.C. 2202a(a)(7),(b)(3), and (e)(1).

At trial, Petitioner entered uncontroverted testimony into evidence of his open, notorious, and hostile access over the property at issue to his land-locked home property from 1971. The purchase of the property at issue was in 1979. Therefore, the period of use pre-dated by eight years even the purchase. The right-of-way filing

complained of was in 1986, a few weeks before the filing of this case below, but that filing was required by a prospective V.A. lender as a condition for granting the loan to settle Respondent's claim, and the issue of disputing facts over the easement was not raised either by pleading responding to Petitioner's Answer or at the trial.

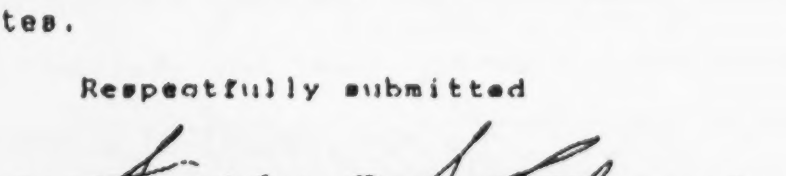
In his brief in chief, Petitioner has cited his autorities for maintaining entitlement to access to his homestead property. The filing of the right-of-way at the behest of a supposed lender should not be construed now as Petitioner self proclaimed legalization of his prescriptive use. In fact, from the Affidavit filed in this Court in March 1989 showing the several times the V.A. and the Respondent coordinated efforts to deny to Petitioner access to refinancing, it now appears the

requirement for the right-of-way filing may have been from the Respondent whose interests V.A. was serving.

CONCLUSION

Premises considered Petitioner prays this Court for a writ accepting review of the Court of Appeals Opinion and publication of its decision. From media reports there are significant numbers of borrowers continuing to encounter the problems alluded to in this case, and such individuals need access to settled law on these issues in planning their estates.

Respectfully submitted



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VERIFICATION

STATE OF INDIANA)
) ss:
COUNTY OF Miami)

I, WILLIAM W. CHOATE, upon being first duly sworn, being of sound mind and not under any coercion, upon oath state as follows:

(1) I have read the PETITION FOR WRIT OF CERTIORARI, as well as its content and I believe that all of same is true to my best knowledge and belief.

(2) I further state that the Appendix to this brief will be forwarded A.S.A.P. under separate cover and that I could not with due diligence, done any better at this time.

William W. Choate
WILLIAM W. CHOATE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 16 DAY OF SEPTEMBER, 1991.

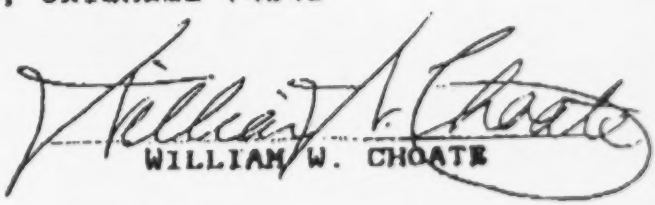
William C. Lud A.
(SEAL) NOTARY PUBLIC

MY COMMISSION EXPIRES: 1/16/94

CERTIFICATE OF SERVICE

William W. Choate, the undersigned, Petitioner, pro se, hereby certifies that he caused to be deposited in the United States Mail, Postage prepaid, Forty (40) like copies of the PETITION FOR WRIT OF CERTIORARI, to the CLERK OF THE SUPREME COURT OF THE UNITED STATES, 1 First Street, N.E., Washington, D.C. 20543; and to:

Mr. Stanley Huser, Jr.,
Box 511,
Holdenville, Oklahoma 74848



Appendix to follow: